

December 21, 2011

Edward G. Heidig
1201 Cedarbrook Way
Sacramento, CA 95831

Re: Your Request for Advice
Our file No. A-11-230

Dear Mr. Heidig:

This letter responds to your request for advice regarding the post-governmental employment provisions of the Political Reform Act (the “Act”).¹ This letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as the finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Additionally, the Commission will not advise with respect to past conduct. (Regulation 18329(b)(8)(A.)) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions.

QUESTION

Do the post-governmental employment provisions prevent you from accepting a consulting position as an expert in litigation involving a state agency for which you have not worked?

CONCLUSION

Given the facts as you have describe them, neither the one-year ban nor the permanent ban prevents your participation as an expert witness in an action involving an enforcement agency for which you did not work.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

You retired, as of September 2, 2011, from the California Department of Managed Health Care (“DMHC”) as its interim director. Recently, a private company contacted you and asked you to consult as an expert witness in its defense against an enforcement action instigated by the California Department of Insurance (“DOI”). During our telephone conversation, you stated that DOI and DMHC regulate the same industry, though they have different focuses, different responsibilities, and they do not regulate the same insurance services. For example, one is responsible for regulating PPO health plans and the other HMO health plans. Neither has control or input on the other’s budget.

You now ask if participating in the defense of an investigation that DOI has launched against a private company would violate the post-employment provisions. You have not worked for DOI, but acknowledge that the health insurance industry as a whole is regulated by both DMHC and DOI. You also stated that while working for DMHC, you did not work on any matter that related to the current enforcement action before DOI.

ANALYSIS

Public officials who leave state service are subject to two types of post-governmental restrictions under the Act, colloquially known as the “revolving door” prohibition and the permanent ban on “switching sides.”

The first restriction is the “one-year ban” prohibiting a state employee from communicating, for compensation, with his or her former agency for the purpose of influencing certain administrative or legislative action (see Section 87406, Regulation 18746.1). Because the last position you held was designated in your agency’s conflict-of-interest code, the one-year ban applies to you. Therefore, you are prohibited for one year from appearing before, including conversing by telephone or in person, corresponding in writing or by electronic communication, attending a meeting, and delivering or sending any communication to your former agency if any of these actions are done for the purpose of influencing governmental decisions made by your former agency. (Regulation 18746.2.)

Your facts do not involve appearing before your former agency. The one-year ban does not, therefore, apply to your potentially acting as a witness in an unrelated case.

The second restriction is the “permanent ban” prohibiting a former state employee from “switching sides” and participating, for compensation, in any specific proceeding involving the State of California if the proceeding is one in which the former state employee participated while employed by the state (see Sections 87401 and 87402 and Regulation 18741.1). In other words, a public official may never “switch sides” in a proceeding after leaving state service.

Sections 87401 and 87402 provide:

“No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply: (Emphasis added).

“(a) The State of California is a party or has a direct and substantial interest.

“(b) The proceeding is one in which the former state administrative official participated.” (Section 87401.)

“No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.” (Section 87402.)

An official is considered to have “participated” in a proceeding if the official took part “personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee . . .” (Section 87400(d).)

You have stated that the enforcement action the Department of Insurance is pursuing against the company that contacted you to serve as an expert does not involve any proceeding that the DMHC pursued during your tenure. Given that you did not “participate” in a “proceeding,” as defined above, the permanent ban does not prevent you from participating as an expert witness on behalf of a private company in the DOI’s enforcement action.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Heather M. Rowan
Counsel, Legal Division

HMR:jgl